No. 693.

THE NEW YORK LIFE INSURANCE COMPANY,
Complainants and Appellants,
vs.
EDSON C. BANGS AND ELIZA R. BANGS,
Defendants and Appellees.

Appeal from the [illegible] Court of the United States for the District of Minnesota.

BRIEF FOR APPELLANTS.

H. L. BAKER,
Of Counsel for Complainants and Appellants.

THE BYRON PRINT PRINTING HOUSE.
1881

UNITED STATES OF AMERICA.

SUPREME COURT.

THE NEW YORK LIFE INSURANCE COMPANY,
Complainants and Appellants.
vs.
EDSON C. BANGS AND ELIZA E. BANGS,
Defendants and Appellees.

Equity Appeal from the District of Minnesota.

BRIEF FOR APPELLANTS.

This is a suit in equity, brought by the appellants, a corporation and citizen of the State of New York, in the Circuit Court of the United States for the District of Minnesota; to compel the surrender and cancellation of two policies of life insurance of $5,000 each, obtained by fraud from the complainants, upon the life of one James H. Bangs, for the benefit of the appellee, Edson C. Bangs, son of the assured, and to enjoin the prosecution of suit at law upon the policies.

A plain statement of the principal undisputed facts in the case carries on its face convincing proof of fraud.

A man forty-six years of age, who has just failed in business, procures insurance on his life to the amount of $12,500, payable to his son, a minor. Of that amount, $10,000 is in

a company whose policies do not provide for forfeiture of the insurance in case of suicide by the assured. Before insuring in the latter company or making any application to them, he applies to two other companies in succession for insurance on his life; each company offers to insure him; he finds the provision against suicide in the policies of each, and asks for a policy without that provision. Each company declines to issue such policy, and he declines to insure in any other way, and the negotiations are therefore broken off. He learns during the negotiations, that the policies of complainants' company do not contain the provision against suicide, and induces a person to procure an agency from complainants. Through the agency thus created he applies for and obtains the policies in question. The complainants, when issuing the policies, have no knowledge of the prior negotiations with other companies. Their policies uniformly omit the provision against suicide, it being their intention to insure against suicide if it is not contemplated when the policy is taken, or effected in pursuance of a fraudulent design.

The insured did not pay the first premium $205.80, but gave his note for that amount, payable twenty days from date. The policies were duly delivered during the life of the note, and a few days later and one day before the maturity of the note, the assured suddenly died, in a manner and under circumstances which could leave no reasonable doubt that the death resulted from poisoning with strychnia. He was sick about twenty-five or thirty minutes, during which he said it would be of no use to send for a doctor, because he was dying. His wife (who had gone to bed leaving him sitting up), after she heard him fall upon the floor ran and told a neighbor that her husband was dying, although she had not gone near him or spoken to him after she left him in his usual health on going to bed. Within twenty-four hours after the death the wife was closeted with a lawyer in

consultation about this insurance. They plan and execute measures to prevent the holding of a *post mortem* examination, and refuse all requests of the insurance companies for such examination. The complainants made several requests for such examination; *and with one of such requests they coupled an offer to pay the policies immediately without question if the examination were allowed and no poison should be detected*, but this also was refused. The widow and her attorneys procure the appointment of a general guardian of the beneficiary, who when appointed enters into an agreement with the attorney, by which the attorney is to furnish money and professional services for the prosecution of suits upon the policies and is to have one-half of the amount realized from the policies.

After making these arrangements and obtaining an injunction from a state court against certain proceedings at law for the disinterment and examination of the body of the insured, the widow and her son locked up the house and went to Iowa, intending to return in about two months. Before they went away complainants served on them and on the general guardian a notice of rescission of the policies for fraud, and shortly afterwards, viz., in the month of March, 1876, complainants filed a bill in equity in the Federal Court for the Eastern District of Michigan, against these defendants to rescind the policies and to procure the disinterment and examination of the body of the insured. In the suit last mentioned a temporary injunction was issued, prohibiting defendants from bringing suit upon the policies; that injunction, together with process for appearance, was served personally on the general guardian of the infant defendant and on the attorney who represented both defendants in relation to the subject matter of the litigation. The defendants also received actual notice of the pendency of the suit in equity, and of the injunction; and thereafter they remained away from Michigan instead of returning as originally intended.

The suit in equity was prosecuted to a final decree declaring the policies void for fraud, and directing their cancelation. In the month of June, 1876, the defendant Edson Bangs, by a guardian *ad litem*, brought a suit upon the policies in the state of Minnesota; complainants pleaded in defense the decree of the Equity Court for rescission, and that plea having been overruled complainants brought this bill.

ABSTRACT OF BILL.

The complainants' bill, after setting forth the citizenship of the parties, alleged in substance as follows: That the policies in question were issued upon the written application of the defendant Edson C. Bangs, and his father, James H. Bangs, the assured. That the policies were delivered to James H. Bangs, December 2, 1875. That these policies and all others issued by this company did not contain the usual clause providing against liability in case of suicide by the insured—the company intending and undertaking, in its policies to insure against death by suicide when such death is not contemplated by the assured at the time of taking his policy and where it is not effected in pursuance of a fraudulent intent. That two days after the delivery of the policies the assured died from the effects of poison voluntarily taken by him for the purpose of producing, and which in fact did produce, his death. That the assured, at the time he applied for and obtained the policies, intended to effect his own death within a short time thereafter, and thereby to defraud the insurance company out of the amount of the policies. That the death of the assured was accomplished in pursuance of such fraudulent design. The bill also proceeded to set forth the history of the case, alleging the facts which complainants would prove in support of the charges of fraud, which were in substance as follows:

Before taking this insurance, Mr. Bangs consulted agents of two other companies, viz: The Mutual of New York, and the Mutual Benefit of New Jersey, with a view to obtaining insurance upon his life; but he declined to insure in either of those companies for the expressed reason that their policies contained the clause commonly known as the suicide clause, *i. e.*, a clause declaring the policy forfeited in the event of the insured "dying by the hand of justice, insurrection or suicide." He then induced a fire insurance agent to apply for and obtain the agency for the New York Life Insurance Company, for the purpose of taking his application, saying to the agent that he was acquainted with the forms of policies issued by that company and liked them better. The agency was accordingly applied for and obtained, and Mr. Bangs made applications for two policies of insurance for $5,000 each. The medical examiner, Dr. F. B. Galbraith of Pontiac, found him upon examination to be a strong, robust man, and pronounced him a first-class risk. Instead of paying the first premium, viz., $205.80, Mr. Bangs gave his note therefor, dated November 16, and payable 20 days from date. The policies were issued as applied for, and on December 2 were delivered to Mr. Bangs. About the same time Mr. Bangs took a policy of insurance upon his life for $2,500 in another company.

The insured continued in his usual good health until the night of December 5, nineteen days from the date of the 20 day premium note. When his wife went to bed that night he remained up, saying that he wanted to do some writing. Between 11 and 12 o'clock the wife heard a fall upon the floor and groans from the room below. She immediately ran down stairs and saw Mr. Bangs lying on the floor, but instead of going up to or near him she ran out of doors and to the house of a neighbor, a Mr. Williamson, whom she summoned to go to her husband, who she said was dying. The neighbor went directly to Mr. Bangs; but Mrs. Bangs went to the house of another neighbor and remained there. That the only eye-witness of the sickness and death of the insured was the neighbor Williamson, who, as a witness under oath, narrates the facts as follows:

"I went right into the house and into the room where Mr. Bangs lay. I found Mr. Bangs lying on his back on the floor, stretched right out. He was lying quiet when I went in, except that he had his arms drawn against his chest and he was moaning, with frequent jerkings of the arms and chest. His hands were clenched. I took hold of his right arm and held it about three or four minutes, when he turned his head and looked at me. I asked him if he had ever been troubled with anything of the kind before, and he answered, 'No, I am dying.' I asked if his trouble was in his head and he did not give me any answer. I asked him if I had not better send for a doctor. He answered, 'No, it

is of no use; I am dying. You can do so if you want to.' And then he asked, 'Where is my wife?' That was the last he said. I then started to go into Mrs. Kittridge's after Mrs. Bangs, and just as I started Mrs. Kittridge came in. I told Mrs. Kittridge she had better send for a doctor, and she then went after the doctor. I then turned to where Mr. Bangs lay and found him jerking and in spasms again. I then caught him by the hand again and held it about a minute and a half or two minutes, when he stiffened and died."

That the condition and symptoms of the deceased before and at the time of his death, and the indications thereafter, were such as to create a moral certainty that the death was caused by poisoning with strychnia, and to preclude the possibility of accounting for the death upon any other hypothesis. On the evening prior to that of his death, the insured visited a drug store in Pontiac which he was not in the habit of visiting, and spent some 20 or 30 minutes standing behind the prescription case in the rear part of the store, ostensibly examining, or reading from, a medical dispensatory. While there he was, during most of the time, alone in that part of the store, and was screened from observation by the case in front of him. In this prescription case and within easy reach were kept, open and ready for use in filling prescriptions, various poisonous drugs appropriately labeled, including strychnia.

Mrs. Bangs did not go near to her husband or speak to him during his illness. After hearing him fall upon the floor she got up and went down stairs, but instead of going to her husband's side to aid him or to see how, if at all, he was sick, she immediately ran out of the house and went to the neighbors. Upon returning in company with Williamson, she went into the adjoining house instead of her own, and remained there until some time after her husband's death.

On the day following the death, Monday, the matters pertaining to this insurance were placed in the hands of attorneys, who immediately made arrangements for the holding of a coroner's inquest on Tuesday. A coroner's inquest was accordingly held on Tuesday, and, nothing being elicited to show what the cause of death really was, a verdict was promptly given that the deceased "had no marks of violence appearing on his body and died by the visitation of God in a natural way and not otherwise." Some consultation was had between the jurymen and the coroner about having a *post mortem* examination, but they concluded it could not be had unless the family were willing. The prosecuting attorney did not attend the inquest.

On Tuesday evening persons representing the insurance companies arrived at Pontiac and requested the widow, in view of the large interests involved, to allow a *post mortem* examination to be made. They found her in company with her legal counsel, and their request met with

an unqualified refusal. They made strenuous efforts to obtain a *post mortem* examination, but in vain.

Shortly after the burial efforts were made to procure the disinterment of the body for the purpose of holding an inquest and a *post mortem* examination under the Michigan statute of 1873, which provides for such disinterment and examination in cases of suspected poisoning. After some days a warrant was issued by a justice of the peace of the county upon complaint made and testimony taken before him, for the disinterment and examination of the body. The sheriff delayed executing this warrant for a day after it was placed in his hands, and in the meantime the widow's counsel filed a bill on her own behalf in the Circuit Court for the county of Oakland, in chancery, and obtained an injunction against the sheriff, the justice of the peace and two of the witnesses, prohibiting them from disinterring the body and from issuing or executing any warrant for that purpose. The defendants in that suit appeared and answered the bill and moved to dissolve the injunction. This motion was opposed, principally on the ground that, there having been one inquest, another could not be held. After a full argument the motion was denied and the injunction sustained. It was well understood by all concerned that this decision practically put an end to all chance of ascertaining, through the aid of the State courts, whether the remains contained poison or not, inasmuch as the symptoms indicated strychnia, and before the defendants in that suit could get the injunction dissolved in the Supreme Court the traces of poison would all have disappeared by decay.

On February 24th the company presented to Mrs. Bangs and to the son and his general guardian, a communication in writing in which the company requested that an autopsy of the body of the deceased might be had, and offered to bind itself to pay the policies forthwith and without further question, if upon such autopsy being made no poison should thereby be detected. The request was refused.

The bill further stated, that the company had no knowledge of the fraudulent intent of the insured, or of any of the foregoing facts tending to show such intent, until after the death of the insured; and that upon learning the facts, they gave notice to the beneficiary and his guardian, and also to the mother, that they claimed a rescission of the policies in consequence of the fraud practiced, and offered to surrender

up the note for $205.80 which had been given for payment of the first premium—that note being then still unpaid, and being the only consideration ever received by the company for the policies.

That on the 24th day of March, 1876, complainants filed a bill in equity in the Circuit Court of the United States for the Eastern District of Michigan, alleging the facts aforesaid, and praying that the body of the assured might be disinterred and examined, and that the policies might be rescinded and decreed to be surrendered up and cancelled, and that the defendants be enjoined from prosecuting suit at law upon the policies. That at the time of filing said bill the defendants were residents and citizens of the Eastern District of Michigan, although temporarily absent therefrom. That the defendant Edson Bangs was a minor, and had a general guardian, resident in said district; and the defendant Eliza Bangs was represented in the matters pertaining to said suit by attorneys residing in said district; that upon the failure of the marshal to find the defendants in said district the court ordered that the process for appearance, issued in said cause, should be served upon said general guardian, and that such service should be good service on the defendants. An injunction was issued as prayed, and was served in the same manner as the subpœna. That a guardian *ad litem* was appointed in the cause for the infant defendant, who filed an answer for the infant denying the allegations of the bill.

A replication was filed by complainants, and on the issue so made a large amount of testimony was taken, the case was regularly brought to a hearing on pleadings and proofs; the court found the allegations of the bill sustained by the proofs, and on May 19th, 1877, granted the decree prayed for.

Amongst the witnesses, whose depositions were taken and used in the cause, were the defendants themselves, who were called by complainants to testify, and were examined *de bene esse* in Minnesota.

That the defendants were residents of Michigan when said bill was filed, but were temporarily absent from their residence under the instructions of their confederates and legal advisers, in order to avoid any proceedings against them for the disinterment and examination of the body of the insured until the lapse of such time as would secure the obliteration by natural decay of any traces of poison which the body might contain. And that, after learning of the complainants' suit in the Michigan Federal Court, the defendants, acting under like instructions, remained absent from Michigan, instead of returning as originally intended, in order to prevent the disinterment of the body, and avoid a fair trial of the case upon the merits. On June 24th, 1876, and while the equity suit was pending in the Michigan Federal Court, defendants caused an action at law to be brought against complainants upon the policies in Minnesota, at a great distance from the place where the cause of action arose and where complainants' witnesses resided. The complainants appeared in the suit at law, caused it to be removed from the State Court, wherein it was brought, to the Federal Court for the District of Minnesota, and pleaded the matter of fraud in defense thereto. Afterwards, and on the rendition of the decree of cancellation in the Michigan Federal Court, the complainants by leave of the court pleaded that decree by supplemental answer in bar of the suit at law (Record, p. 268). To that supplemental Answer defendants (plaintiffs at law) demurred; the court sustained the demurrer; and the complainants brought this bill. The bill alleged and charged a conspiracy between the defendants and others, and prayed for a discovery as well as for general relief.]

THE ANSWER.

The defendants' Answer consists in substance of three grounds of defense.

1. A general demurrer to complainants' bill on the ground that complainants have a complete remedy at law for the matters complained of.

2. That the bill cannot be maintained, because the court in which the action at law on the policies was pending when the bill was filed first obtained jurisdiction of the cause, and the court of equity cannot therefore take cognizance of the matters complained of.

3. General denials of the fraud charged and of the fraudulent intent of the assured; and an attempt to account for the death of the assured by natural causes.

The two first grounds of defense were principally relied upon. The third will be adverted to further on in the discussion of the testimony.

AMENDMENTS TO BILL AND ANSWER.

While this suit was pending in the court below, judgment was rendered against complainants in the suit at law upon the policies. The defendants, by an amendment to their answer, set up the judgment at law and claimed that the same was *res judicata* of the matters in complainants' bill. (Record, p. 84.) The complainants, by an amendment to their bill, alleged that the said judgment was not an adjudication upon the matters alleged in their bill; that their plea setting up said matters of fraud in the suit at law was withdrawn by permission of the court before trial was had or commenced, and that the judgment was an adjudication only upon the *prima facie* obligation of the policies, and upon the matters alleged in complainant's plea, which had been overruled on demurrer. (Record, p. 85.)

TESTIMONY FOR COMPLAINANTS.

We are relieved from an extended discussion of facts and testimony in this case, for the reason that the essential facts alleged in the bill are all proved beyond question by undisputed testimony.

References to Testimony in Printed Record.

Negotiations with other companies for policies without suicide provision: pp. 128 to 133; deposition of Perrin W. Fox. Also, pp. 133 to 139; deposition of Daniel Hubbell.

Opportunities of obtaining poison: pp. 89 to 97; deposition of Frederick S. Stewart.

Sickness and death of assured, and peculiar conduct of wife: pp. 117 to 128; deposition of Williamson.

Further as to conduct of wife: p. 229; her own deposition; ibid, pp. 72 to 75.

Assured would not say how he was sick, but simply said he was dying. Wife ran to the neighbors, and said he was dying without having had any apparent means of knowing how, if at all, he was sick: pp. 74, 118, 119.

Death resulted from poisoning with strychnia; can be accounted for in no other way:

Deposition of Dr. S. H. Douglass, of the Michigan University, pp. 139 to 145.

Deposition of Dr. D. O. Farrand, of Detroit, pp. 153 to 155.

Deposition of Dr. A. B. Lyon, of Detroit, pp. 145 to 152.

Deposition of Dr. S. S. Lungren, of Toledo, pp. 195 to 197.

Deposition of Dr. Wm. W. Jones, of Toledo, pp. 194, 195.

Deposition of Dr. F. B. Galbraith, of Pontiac, pp. 155 to 157.

Widow retained and consulted with lawyer about insurance next day after death: pp. 180, 181; deposition of W. N. Draper.

Widow's lawyer, Draper, procured Coroner's inquest to be held, etc.—the inquest: pp. 97 to 107.

Request of Insurance Companies for *post mortem* examination, and refusal: pp. 113, 114.

Proceedings under State statute for disinterment and *post mortem* examination of body of insured: pp. 168 to 174; deposition of H. L. Baker.

Those proceedings enjoined on bill in chancery by widow: pp. 168 and 178.

Written request by complainants for *post mortem* examination, and offer to pay if no poison found: pp. 168 and 36.

Notice of rescission: pp. 168 and 36.

Defendants residents of Michigan: pp. 174 to 175. Petitions of widow to Probate Court of Oakland county, Michigan. Also, pp. 124, 125 and 128; letter of widow to Williamson, April 2, 1868, stating when she will return to Pontiac. Also, p. 137; deposition of Daniel Hubbell, whom widow told that she was going to visit friends, and would be gone about two months.

The written applications made to complainants by the insured and beneficiary, for the policies: pp. 202 to 211.

These applications with friends' certificates and medical examiners reports (pp. 202 to 211), constituted the only information the complainants had concerning the insured before issuing the policies: pp. 199, 200.

Proofs of death made by general guardian appointed in Michigan: pp. 212 to 222.

Statements of same guardian as claimant under the policies: pp. 215 and 218, 219.

Letters of guardianship produced by same guardian in support of his claim: pp. 216, 217 and 220, 221.

In connection with subject of life insurance, Bangs talked

with others about suicide; said "he did not think it was anything for a man to commit suicide; that there was nothing in the world worth living for—nothing but trouble." Record, p. 162; deposition of Thompson.

Bangs was without financial means. Brought to Pontiac only $1,800; had only that remaining out of $2,000 borrowed from his brother; business carried on in name of brother; at time of taking insurance had lost money, so that he had only about $1,100 remaining out of the $2,000 borrowed: Record, p. 165; deposition of Varney.

The fact that no poison was found in the body of deceased on the examination, held under order of Federal court, six months after the death, is of little weight. Strychnia, organic poison, disappears by absorption; little chance of detecting it after such lapse of time: Record, pp. 143, 144; pp. 149 and 154.

DEFENDANTS' TESTIMONY.

As to the facts which are susceptible of direct proof there is but little if any conflict of testimony.

Such controversy as there may be upon the testimony is confined almost wholly to the question of intention and other matters of inference.

The defendants' proofs consist principally of the record of the judgment at law. Record, pp. 235 to 318.

Aside from that record, their proofs consist of an attempt to show that the death of the assured might have resulted from some other cause than poisoning with strychnia.

See deposition of defendant Edson Bangs, pp. 225 and 226, in which witness says that a scuffle between his father and others took place some eight or ten days before the death, in which his father was thrown upon his back across the edge of a car, and after which the father complained of his side hurting him.

Deposition of Dr. Boardman, of St. Paul, pp. 321 and 322; 324 and 325.

Deposition of Dr. Flagg, of same place, pp. 322 and 323, 326 and 327.

The two last named witnesses were sworn as medical experts; and having read the testimony of complainants' witnesses, testify that, in their opinion, it is not an exclusive inference from the testimony that the death was caused by strychnia; that it might have been due to an injury of the spine received about ten days before the death; and that such injury might have resulted from the facts testified to by Edson Bangs.

These physicians only undertake to affirm a *possibility* that the death may have resulted from a cause other than strychnia. They do not say that there is any such *probability*. Both say on cross-examination that they never actually knew of a case of death from a mechanical injury to the spine, with the symptoms and under the circumstances which existed in this case; and that they know of no such case in the books: pp. 324 to 327, cross-examination.

This attempt to weaken complainants' case is fully met by

COMPLAINANTS' REBUTTING TESTIMONY,

which shows (1) that Mr. Bangs was not thrown upon his back, on the edge of a car or otherwise, in the alleged scuffle, and (2) that the supposed possibility testified to by Doctors Boardman and Flagg is contrary to all medical experience and knowledge, and is not within the bounds of reason.

Alden M. Varney and Jason Thompson, two disinterested witnesses employed at the mill where the so-called scuffle is said to have taken place, swear that Edson Bangs' testimony is essentially untrue; that there was in fact no scuffle between Bangs and others; Bangs climbed into the mill hop-

per and sat down; a man took hold of his collar to remove him; then Bangs got up and climbed out of his own accord; Bangs was no different in appearance after this occurrence. Record, pp. 160 to 166.

Doctors Jones and Lungren, of Toledo, testify that there is no such possibility as that testified to by Doctors Boardman and Flagg, and give their reasons. Record, pp. 194 to 197.

ASSIGNMENT OF ERRORS.

The court below erred—

(1). In sustaining the general demurrer to complainants' bill, and in refusing to look into the testimony and consider the case upon its merits, and in decreeing that the complainants' bill be dismissed.

(2). In refusing to enter a decree as prayed in complainants' bill on the final hearing.

In the court below no hearing of the cause upon the merits was ever had. On the coming in of the answer complainants moved for a temporary injunction; on that motion the court decided to sustain the general demurrer to the bill embraced in defendants' answer, and suggested to defendants' counsel that they might withdraw their answer and interpose the demurrer merely. The suggestion was not acted upon; the answer was allowed to remain, and it was thus made necessary to take full proofs and bring the cause to a hearing on pleading and proofs.

On the final hearing of the cause the judge of the court below declined to look into the testimony or consider the cause further than to reiterate his former decision sustaining defendants' demurrer.

Hence no more specific assignment of errors than the foregoing can be made.

LAW.

Upon the case made by the bill the complainants were and are entitled to a decree for the rescission and cancellation of the policies.

The case comes under a well established head of equity jurisdiction, viz., the jurisdiction for the rescission and cancellation of agreements, etc., obtained by fraud.

1 Story's Eq. Jur., § 693.
Adams' Eq., p. 174.

In cases similar to this in all essentials the jurisdiction for cancellation, etc., has been uniformly exercised in England.

De Costa v. Scandaret, 2 P. Wms., 170.
French v. Connelly, 2 Anstruther, 454.
Goddart v. Garrett, 2 Vern., Ch. Rep., 269.
Whittingham v. Thornburg, 2 Vern., Ch. Rep., 206.
India, &c., Ins. Co. v. Dalby, 7 Eng. L. & Eq., 250.
British Equitable Ins. Co. v. Great Western R. W. Co., 3 Bigelow Ins. Rep., 268.
Traill v. Baring, 4 Giffard, 485.
Barker v. Walters, 8 Beav., 92, 96.

The case of the *British Eq. Ins. Co. v. Great Western R. W. Co., supra*, decided in 1869, was a bill in equity to restrain an action at law on a life policy. The court, holding that there had been a suppression of a material fact, and that the policies were thereby rendered void for fraud, say (p. 269), "it is clear from the decision in *Traill v. Baring* "[4 *Giff.*, 485], and many other cases of a similar kind, that "this court is bound to pronounce upon the validity of such "contracts, and I am not at liberty to decline the jurisdic- "tion. All the authorities cited upon this point go to the "same effect, that any contract, affected as this is with fraud,

"is cognizable in this court, although it may also be cogniz-
"able in a court of law. Here there was the suppression of
"a fact which ought to have been disclosed, and in deciding
"the case I adopt the rule laid down by Mr. Justice Cres-
"well in the case of *Jones v. Provincial Ins. Co.* [3 *Com.*
"*B., N. S.*, 65], with reference to the misrepresentation
"there alleged."

That the courts of equity both in England and in this country have the *jurisdiction and power* to decree the rescission and cancellation of insurance policies, and all other agreements which have been obtained by fraud, has, we apprehend, never been questioned.

But it is said that that jurisdiction or power is or is not to be exercised in any particular case, according as the court may find it expedient to grant or refuse the relief, in view of all the facts and circumstances of that particular case.

And acting upon this principle this court and the court from which this appeal was taken, have each refused equitable relief in a case somewhat similar to that made by the bill in this cause before it was amended, for the reason that the matters there complained of would constitute a complete defense at law.

Phœnix Insurance Co. v. Bailey, 13 Wall., 616.

Insurance Co. v. Stanchfield, 1 Dill., 496.

In these cases the courts, though fully recognizing their jurisdiction to grant the relief asked, declined to interfere because there seemed to be no special reasons why the defendant should not be allowed to prosecute his suit at law upon the obligation sought to be cancelled.

We have no occasion in this case to question the correctness of either of those judgments.

This case is broadly distinguishable from either of those cases, in that

(1). Complainants' bill before it was amended, showed special grounds for equitable relief which did not exist in the cases cited; and

(2). The case as presented by the amended pleadings is one for a perpetual injunction against the enforcement of a judgment at law; and as such differs in important particulars from a suit to cancel an outstanding legal obligation before judgment upon it.

The special reasons for equitable interference in this case will be pointed out further on.

As a bill to enjoin the enforcement of a judgment at law, this case depends for its decision upon considerations wholly different from those which controlled the decision of the two adjudged cases.

A judgment at law having been obtained upon the legal obligations, it can no longer be said, as in the cases last referred to, that complainants may obtain relief at law by making the matters complained of a defense to an action on the policies. And the question here is whether the complainants have lost their right to complain of the fraud by failing to avail themselves of it as a defense to the suit at law upon the policies.

If the proofs in this case show that the obligations, upon which the judgment at law was obtained by defendant, were fraudulently procured, the judgment at law is against conscience, and should be enjoined unless the complainants have lost their right to complain of the fraud by failing to make it a defence to the suit at law; *i. e.* unless the judgment at law is a bar to the matters herein complained of upon the principle of *res judicata*.

Let it be conceded that, if the bill impeaches the *legal rectitude* of the judgment at law, it is barred by the judgment.

Let it also be conceded that the bill will impeach the legal rectitude of the judgment if it alleges matter which;

1. Would contradict the allegations or proofs on which the judgment is founded, or

2. Matter which was actually tried and determined by the court of law, or

3. Matter which would constitue a *purely legal defense* to the obligation sued on.

But unless the matter here alleged comes under one of these three descriptions it is not barred by the judgment on the principle of *res judicata*.

That is to say, the judgment at law embraces, and is *res judicata* upon such matters, and only such as were necessary to prove or disprove the existence, at the time of the trial, of the legal obligation on which the judgment is based; *e. g.* the plaintiffs' allegations and proofs, and any matter which, acknowledging the making and the entire validity of the obligation sued on, tends to show that the obligation had been discharged or performed.

But if there be matter in the obtaining of the contract which, admitting the contract to be valid at law, gives the obligor a right of action, independent of that of the obligee, either in law or equity, such matter, if not actually tried and determined at law, is not embraced in the judgment.

If the matters complained of be in themselves originally cognizable in equity—such as fraud—complainants may at their election either make them a defense at law, or suffer judgment to go against them at law and seek relief in equity.

Boyce's Executors v. Grundy, 3 Peters, 215.
Whitingham v. Thornberg, 2 Vern., Ch. R., 206.
Thornton v. Knight, 16 Sim., Ch., 508.
Hough v. Waters, 30 Cal., 209.
McCreary v. Casey, 45 Cal., 128.
Bentley's Executors v. Dillard, 6 Ark., 79.
Conway v. Ellison, 14 Ark., 364.
Harland v. Wingate's Administrators, 2 J. J. Marsh, 139.
Cave v. Davis, 5 B. Mon., 392.

The judgment at law against complainants is an adjudication of nothing further or other than this, viz: *That upon the face of the written obligations the obligee was entitled to judgment, notwithstanding the decree pleaded in bar.* Whether there are any matters *in pais* which would make it against conscience to enforce that judgment, or would give the obligors a cross action, is a question in no way involved in the judgment.

Language may be found in some of the adjudged cases, which seems to lay down the principle that anything which *may* be made a defense at law must be so made or the judgment will be a bar to a subsequent action. But in those cases it will, we think, be found that the facts did not call for the application of the principle thus broadly laid down, and that the language, therefore, so far as it undertakes to lay down the doctrine as a general principle is *obiter*. This is true of the well known case of *LeGuen v. Governeur*, 1 John's Cases, 437.

But whatever may be the rulings of other courts upon this point, the doctrine in the Federal Courts is settled in accordance with our proposition by the case above cited of *Boyd's Executors v. Grundy*, 3 Peters, 215. The latter was a bill in equity to enjoin a judgment at law which had been recovered against complainant for a payment due upon a contract for the sale of lands. The bill prayed that the enforcement of the judgment might be enjoined, and the contract rescinded on the ground of fraud. It was claimed *contra* that such injunction would not lie because the alleged fraud might have been set up as a defense at law. The court granting the injunction, say, per Johnson, J. (p. 215): "This court has often "been called upon to consider the sixteenth section of the "judiciary act of 1789, and as often, either expressly or by "the course of its decisions, has held, that it is merely declaratory, making no alteration whatever in the rules of equity "on the subject of legal remedy. It is not enough that there "is a remedy at law; it must be plain and adequate, or, in

"other words, as practical and efficient to the ends of justice "and its prompt administration as the remedy in equity.

"In the case before us, although the defense of fraud "might have been resorted to, and ought to have been sus- "tained in that particular suit, and, I will add, would have "greatly aided the complainant in a bill to rescind, yet it was "obviously not an adequate remedy, because it was a partial "one. The complainant would still have been left to renew "the contest upon a series of suits."

The case of *Harlan v. Wingate's Administrators*, 2 J. J. Marshal, 139, was a bill in equity to enjoin a judgment recovered against complainant on an obligation which complainant claimed to have satisfied by "payment after the day." The court sustaining the bill say:

Per Robertson, J.—"Harlan might have made his defense at law. But his failure to do so cannot deprive him of his right to appeal to the chancellor for relief. When the common law judge and the chancellor have concurrent jurisdiction, a party who makes defense at law cannot afterward seek redress in chancery. But if he make no defense at law he may ask relief of the chancellor.

"At common law, 'payment after the day' could not be pleaded in an action at law. The only relief was in chancery. The statute authorizing a 'payment after the day,' to be pleaded at law, is cumulative, not exclusive. It does not oust the chancellor of his jurisdiction. *Whitington v. Roberts*, 4 Mon., 173."

Concurrent Jurisdiction.

It is said that the complainants are barred from maintaining this bill on the principle that, where courts of law and equity have concurrent jurisdiction, the judgment of the court which first obtains jurisdiction shall be final. To this we reply—

1. This is not a case where the jurisdiction is concurrent in the proper sense of the term. In this case neither party

has an election to apply either to a court of law or to a court of equity for *affirmative relief*.

The obligee must apply to a court of law, and the obligor to a court of equity only, for affirmative relief.

2. The principle referred to applies only to cases where a party seeks to withdraw from another court the trial of an issue there pending. This bill seeks no such withdrawal. The issue of fraud was eliminated from the suit at law, without the aid of the equity court. The defense of fraud was voluntarily withdrawn by complainants from the law court before judgment, and with the permission of that court. At the time of rendering the judgment, the court of law had no jurisdiction over the question of fraud, and could not therefore pronounce judgment upon that question.

That such matter of defense (*i. e.*, matter which is not necessarily a part of the plaintiff's case to establish in order to make out his right to recover), may be withdrawn, and if withdrawn is not barred by the judgment.

See Foster v. Milliner, 30 Barb., 395.
Hough v. Waters, 30 Cal., 309.

In the case of *Foster v. Milliner*, *supra*, the court say (p. 395), "It is entirely clear that a cause of action may be "withdrawn at or before the trial, and so may a distinct mat- "ter of defense, which is not necessarily a part of the plain- "tiffs' case to overcome and establish in order to make out "his right to recover. And as to matter so waived or "withdrawn, the trial and judgment are no bar. (*Snider v.* "*Croy*, 2 *John*, 227; *Seddon v. Tutop*, 6 *Term*, *R.* 607; "*Kitchen v. Campbell*, 3 *Wils*, 304; *Brockway v. Kinney*, "2 *John*, 210; *Louw v. Davis*, 13 *id.*, 227.)"

If the facts necessary to support the judgment at law can exist at the same time with the facts necessary to support the bill in equity or counter-claim, the judgment is not *res judicata* of the latter.

Freeman on Judgments, § 282.
Foster v. Milliner, *supra*.

The respective jurisdictions of the law and equity courts in cases like this before judgment rendered at law are defined and explained in the case of *Hoare v. Bremridge, Law Rep., 8 Ch. App.*, 26. On motion for an injunction by the insurers against a pending suit at law on the policies, the court say: "It is only in an imperfect sense that a case of this "kind is one of concurrent jurisdiction. Each party, to be "an actor and to bring forward his own case, is not at liberty "to choose this court or the court of law as he pleases, but "each if he would be plaintiff must come, the one into equity, "and the other into a court of law. Each is *rectus in curia*. "The assured cannot come into equity to sue on this policy; "the insurers can come into equity only, before they are "sued, to have it delivered up to be cancelled. Each, there-"fore, is suing of necessity in the proper court, and in the "only court in which he can sue to have that which he "claims as his right. But what the one claims as his right "in equity would constitute his defense at law, what the "other claims as his right at law would constitute his defense "in equity. That is the true state of the case."

Special Grounds for Equitable Relief in Addition to the General Ground of Fraud.

(1). At the outset defendants had under their control very important evidence as to the cause of the death, which they refused to disclose, and would not suffer to be brought to light; and that evidence was being destroyed. This alone constituted sufficient ground for equitable interference.

They waited for the complete destruction of this evidence before asserting their fraudulent claims. The proofs of death and demand for payment were not made until more than two months after the death, and suit was not brought until more than six months after the death. The complainants were compelled to resort to the Federal Court of equity

in Michigan in order to reach the evidence which was being destroyed, and in order to protect themselves against being made the victims of what was to all appearances a remarkably bold fraud.

(2.) The bill thus brought in the latter court, after complainants had been driven to seek relief in equity, presented a clear case for equitable relief, and one in which this entire controversy should have been determined. But the defendants sought to defeat complainants' efforts to obtain relief, not by meeting the case presented, but by going and remaining out of the jurisdiction of the courts, within whose jurisdiction the body was buried.

(3). After waiting such length of time as would be amply sufficient for the obliteration of any traces of poison which the body of the deceased might contain, they brought suit upon the policies in a locality at a great distance from that where the cause of action arose, and where complainants' evidence was to be had.

The prosecution of suit on the policies in the remote locality was vexatious and oppressive.

The State courts provide against the infliction of similar hardship on a defendant even within the narrower limits of the respective states, by proceedings for a change of venue.

The hardship thus sought to be inflicted upon the complainants in this case was an abusive advantage taken of complainants' peculiar status under the law.

As is well known, the complainants are required by the law of each state in which they do business, to have a representative in that State to receive service of process so that they may be sued there.

That requirement, designed by each state for the protection of its resident policyholders, is, as appears by this case, susceptible of great abuse. The complainants require no further evidence than the policies themselves to make out their cause of action. But the insurers, in order to establish the

defense of fraud, must prove various facts and circumstances by a large number of witnesses. The witnesses cannot be compelled to attend the trial; if any could be induced to go voluntarily it would be at great expense.

In short, the defendants have from the outset labored strenuously to prevent a fair trial of the questions involved, in any forum—first, effecting the destruction of important evidence, and then bringing suit in a distant forum, where complainants could not produce the evidence necessary for a fair trial.

(4) This is a bill for discovery as well as for general relief. As such, it has elicited the discovery of important facts exclusively within the knowledge of the defendant, Eliza Bangs, a co-conspirator (see defendant's answer, p. [illegible], folio 198, also pp. 71 to 74). The bill was therefore clearly maintainable for purposes of discovery. And the jurisdiction of equity having attached for that purpose, the court should proceed to determine the whole matter in controversy (*Russell v. Clarke's Exrs., 7 Cranch, 69*); especially where the general relief asked is itself of equitable cognizance.

1 Story's Eq. Jur., secs. 71 and 72, *et seq.*

Rescission in Equity of Contracts Fraudulent in their Inception a Matter of Right.

Touching the jurisdiction of equity to grant relief in cases of fraud, the following propositions are submitted:

(1) The courts of equity have always been vested with jurisdiction over all cases of fraud in matters of contract; and have uniformly administered their own appropriate remedies in the exercise of that jurisdiction.

(2) The fact of fraud is alone sufficient to give the court of equity jurisdiction and to entitle the defrauded party

to equitable relief. Where fraud is established, such relief is demandable as matter of right, and is not a matter of grace or favor which the court may grant or withhold at its option, or upon considerations of convenience.

British Eq. Ins. Co v. Great Western Ry. Co., 3 Bigelow Ins. Rep., 208.
Traill & Baring, 4 Gifford, 495.

(3) The jurisdiction of equity for the rescission of contracts for fraud practiced in obtaining them is not taken away or impaired by the fact that the fraud may be set up as a defense to a suit at law upon the fraudulent obligation or made the subject of an action at law for damages.

Colt v. Wollaston, 2 Pere Williams, 156.
Green v. Barrett, 1 Simons, 45.
Maitland v. Backhouse, 16 Simons, 58.
1 Story's Eq. Jur., sec. 64, i.
Mayne v. Griswold, 3 Sandf. Rep., 464 and cases there cited.

The case of *Mayne v. Griswold, supra*, was a bill to rescind a contract for the purchase of certain bonds, upon the ground of fraudulent representations as to their value. Demurrer that complainant had a complete remedy by an action at law for damages.

The court, in a carefully considered judgment overruling the demurrer, review the cases cited for the demurrer, viz.: *Newham v. May*, 13 Price, 749; *Russell v. Clarke's Ex'rs*, 7 Cranch, 69; *Bradley v. Bosley*, 1 Barb. Ch., 125; *Hardwick v. Foster*, 1 Bibb, 212; 4 Dana, 195; Littell's Select Cases, 374, and say (p. 477, *et seq.*):

"Upon examination it will be found that these cases all admit and allege the jurisdiction of the court of equity in setting aside contracts founded in fraud and misrepresentation, but maintain that if a party who has been defrauded does not seek to rescind a sale but affirms it and asks for damages which he has sustained by reason of fraud or

misrepresentation practiced upon him in relation to it, he must treat his claim against it as a court of law. We understand the doctrine is universally stated in the Kentucky cases. If your claim is solely for damages, whether for breach of the contract or for fraud in making it, and you seek not to rescind it altogether, you are, as a general rule, confined to your action at law; but if you seek to have the contract rescinded and declared void, you may have relief in equity although you may only recover money, and the same amount that you would have recovered at law. In the suit at law the money by way of damages, is the principal object; in equity, however, the rescinding of the contract is the principal, and the recovery in money is an incidental, though a necessary consequence.

* * * * * * *

"It is one of the doctrines of a court of equity that where a plaintiff has a plain, adequate and complete remedy at law, a court of equity generally will not interfere, and for this reason they will not, as a general rule, sustain a bill for damages merely, whether for breach of contract or for tort, a court of law giving in such case full and adequate relief. The application of this rule, however, must be controlled and governed by another equally well established, that if the jurisdiction originally has properly attached in equity on account of the supposed defect of remedy at law, that jurisdiction is not changed or taken away by the fact that courts of law have subsequently exercised jurisdiction in similar cases. 'This has been repeatedly asserted,' Mr. Justice Story remarks (1 Story's Eq. Jur., § 64, i), 'by courts of equity, and constitutes in some sort the pole-star of its jurisdiction.'

"The decision of the point before us then, depends not merely on the question whether the party has an adequate remedy at law, but also on this other question, whether the case falls within one of the acknowledged heads of equity jurisdiction, for if it does, the mere fact that a court of law will now grant the same relief as a court of equity, does not oust the previously well established jurisdiction of the latter. * * *

"In matters of fraud the jurisdiction of the court of chancery is probably coeval with its existence. There is no period in the history of the court when it did not possess it. It is concurrent with courts of law in all cases of fraud except that of wills of real estate, and therefore, it is said, will not lay down rules restrictive of such jurisdiction, but will proceed in every case of fraud upon its own peculiar circumstances (1 Fonb., b. 1, § 3, p. 12). The objection now made has been frequently made before, and it has been uniformly held in cases which turned upon the question of jurisdiction, as far as our researches have extended, that the jurisdiction in cases of fraud was not taken away because the parties had an adequate remedy at law."

The court then proceeds to mention some of the decided cases similar to that before it, and says, (p. 479):

"The first case is *Colt v. Wollaston*, 2 P. Williams, 156, decided in 1723, in which the bill was filed to recover back two several sums which the plaintiff had paid to the defendants, as managers of a land security and oil patent company for extracting oil out of radishes. The Master of the Rolls observed: 'It is no objection that the parties have their remedy 'at law, and may bring an action for money had and received for the 'plaintiff's own use, for in cases of fraud the court of equity has a con-'current jurisdiction with the common law, matter of fraud being the 'great subject of relief here. Accordingly, cases of this nature have 'frequently met with relief in this court.'"

"The next case we shall cite is *Green v. Barrett*, 1 Simons, "45, decided in 1826. That was a bill to recover back depo-"sits paid by a subscriber to a joint stock company, where "the project was a bubble. The bill was demurred to, and "one ground of demurrer was, that the only remedy of the "plaintiff was by an action for money had and received; but "the vice-chancellor, after remarking on the facts, said, that "the only question was, whether a bill in equity would hold "or whether the plaintiff must have recourse to law; and as "it appeared the whole scheme was a mere snare to entrap "the unwary, on the authority of *Colt v. Wollaston*, he over-"ruled the demurrer. We shall look in vain for any case in "England for the one hundred and three years intervening "between *Colt v. Wollaston* and *Green v. Barrett*, in the least "affecting the authority of these cases. *Green v. Barrett* "was followed in 1828, by *Blain v. Agar*, 5 Sim. R., 289, "which was similar in its general features, and was similarly "decided. Indeed, so well was the jurisdiction considered to "be established in England, that in the late case of *Seddon* "*v. Connell*, decided in 1840 (16 Sim., 58), and which, in "some respects, resembled the case before us, although the "bill was demurred to, yet the objection we are now con-"sidering was not even raised."

(4) This jurisdiction has been habitually exercised for the rescission of policies of insurance obtained by fraud, as well after a loss had happened as before.

See Cases cited on p. 16 of Brief.

(3) The jurisdiction above described belongs to the Federal courts of equity. The jurisdiction of the latter courts, so far as regards subject matter, is co-extensive and identical with that of the English Court of Chancery at the time of the adoption of the constitution.

The sixteenth section of the Federal Judiciary Act, providing that "suits in equity shall not be sustained in either "of the courts of the United States, in any case where a "plain, adequate and complete remedy may be had at law," is merely declaratory, and introduced no new rule of equity jurisdiction for the Federal courts.

Boyce's Exrs. v. Grundy, 3 Pet., 215.
Parker v. Winnipiseogee, etc., Co., 2 Black, 551.
Robinson v. Campbell, 3 Wheat., 223.

It is believed that these propositions are incontrovertible, and that this court did not intend, in the case of the *Phœnix Ins. Co. v. Bailey*, to establish any principle inconsistent with them.

Whatever may be the true scope and effect of the case last mentioned as a precedent, it certainly will not be treated as establishing the broad proposition contended for by defendants, viz., that wherever the fraud complained of may be made the ground of an action or defense at law, the plaintiff cannot have relief in equity. Fraud has always constituted a defense at law, and, ever since the case of *Pasley v. Freeman*, 3 Term Rep., 51 (decided 1789), has afforded good ground for an action at law for damages; yet the jurisdiction of equity to relieve against the same fraud has, at the same time, subsisted unimpaired. It is not to be supposed that this court intended, in the case above mentioned, to decide that the long continued and uniform exercise of this jurisdiction has been an usurpation throughout, as it must have

decided in order to establish the doctrine contended for by defendants.

It seems, from the opinion delivered in the latter case, that the court treated that case, in some respects at least, as a bill *quia timet*, and decided it upon principles applicable to that class of cases only. A reason for so treating that case may, perhaps, be found in the fact that the fraud there complained of consisted in a misrepresentation for which the policy itself provided a penalty.

But the case at bar is not, in any proper sense, a bill *quia timet* merely, and it is not to be governed by the principles applicable to such cases. It is not the *mere fear of a future wrong* that is here complained of. The wrong here has already been inflicted, viz., the fraudulent obtaining of a legal obligation *prima facie* valid; and for this wrong the plaintiff asks redress. It has never been necessary to the obtaining of redress in equity against fraud that there should be shown, in addition to the fact of fraud, some one of the special grounds which are usually requisite to sustain a bill *quia timet*. And it is not to be supposed that this court has laid down a rule making such showing necessary.

Neither is it to be supposed that the court has laid down the doctrine that in cases like the present it is the duty of the court of equity to refrain from interfering, on the ground that the offending party has a superior right to have the question of his fraud tried at law. Such doctrine would necessarily affirm in substance that there is no remedy in equity for a fraud perpetrated in *creating* a legal obligation, and that the injured party must suffer himself to be sued at law upon the fraudulent contract. Would not this be contrary to sound equity principles? Is not the very act of obtaining such an obligation in and of itself a wrong and injury against which, with nothing further stated, equity should relieve? To say that a party against whom such an

obligation has been obtained can have no affirmative relief, but must passively permit his adversary to perpetrate the still further wrong of an attempt to enforce the obligation at law; that the offending party has a sacred right to make use in the law courts of whatever advantages his unconscionable acts may afford him—amongst others of such advantages, to select a tribunal most remote from the means of proving the original wrong, and there compel the injured party to abide his chances of obtaining redress at law for the fraud—to so hold would, we think, manifest a degree of lenity to fraud and a tender regard for the prosperity of wrong-doers wholly at variance with the principles and practice of equity tribunals.

H. L. BAKER,

Of Counsel for Complainants and Appellants.

Extract from chapter 172 of the Compiled Laws of the State of Michigan, compilation of 1871, vol. 2, p. 1479, *et seq.*, said chapter being entitled,

"GUARDIANS AND WARDS."

(4810) SECTION 1. The Judge of Probate in each county, when it shall appear to him necessary and convenient, may appoint guardians to minors and others, being inhabitants or residents in the same county, and also to such as shall reside without the State and have any estate within the same. * *

(4816) SEC. 7. Every guardian appointed as aforesaid shall have the care and management of the estate of the minor, and shall continue in office until such minor shall arrive at the age of twenty-one years, or until the guardian shall be discharged according to law.

(4817) SEC. 8. Every such guardian shall give bond, with surety or sureties, to the Judge of Probate, in such sum as the judge shall order, with conditions as follows:

First. To make a true inventory of all the real estate, and of all the goods, chattels, rights and credits of the ward, that shall come to his possession or knowledge, and to return the same into the Probate Court at such time as the judge shall order;

Second. To dispose of and manage all such estate and effects according to law, and for the best interest of the ward, and faithfully to discharge his trust as such guardian;

Third. To render an account, on oath, of the property in his hands, including the proceeds of all the real estate which may be sold by him, and of the management and disposition of all such property, within one year after his appointment, and at such other times as the Judge of Probate shall direct; and,

Fourth. At the expiration of his trust, to settle his accounts with the Judge of Probate, or with the ward, or his legal representatives, and to pay over and deliver all the estate and effects remaining in his hands, or due from him on

such settlement, to the person or persons who shall be lawfully entitled thereto. * * * * * *

(4821) SEC. 12. Nothing contained in this chapter shall impair or affect the power of any court of common law, probate court, court of chancery, or court of a justice of the peace, to appoint guardians to defend the interests of minors impleaded in such court, or interested in any matter there pending, nor their power to appoint or allow any person, as next friend for a minor, to commence, prosecute or defend any suit in his behalf. * * * * * *

(4830) SEC. 21. Every guardian appointed under the provisions of this chapter, whether for a minor or any other person, shall pay all just debts due from the ward out of his personal estate and the income of his real estate, if sufficient, and if not, then out of his real estate, upon obtaining license for the sale thereof, and disposing of the same in the manner provided by law.

(4831) SEC. 22. Every such guardian shall also settle all accounts of the ward, and demand, sue for and receive all debts due to him, or may, with the approbation of the Judge of Probate, compound for the same, and give a discharge to the debtor, on receiving a fair and just dividend of his estate and effects; and he shall appear for and represent his ward in all legal suits and proceedings, unless where another person is appointed for that purpose as guardian or next friend.

SUPREME COURT

OF THE

UNITED STATES.

NO. 693.

THE NEW YORK LIFE INSURANCE COMPANY,
Appellant,

vs.

EDSON C. BANGS AND ELIZA E. BANGS,
Appellees

BRIEF FOR APPELLEES.

C. K. DAVIS,
Counsel for Appellees.

J. W. Cunningham, Printer, St. Paul, Minn.

Supreme Court of the United States.

No. 693.

THE NEW YORK LIFE INSURANCE COMPANY, *Appellant*,

against

EDSON C. BANGS and ELIZA E. BANGS, *Appellees*.

STATEMENT.

A great portion of the history of this suit will be found in the stating part of our brief in *Bangs vs. Ins. Co.*, No. 227, and reference is therefore made to that paper.

It will be seen by an examination of the records in these cases, that to the suit at law the company filed an answer December 11, 1876, setting up as defences, the same grounds of fraud and suicide that are alleged in the bill in this suit (p. 248).

In this, the first answer, nothing is stated as to any proceedings in the United States Circuit Court in Michigan, although they were then pending, but on the 18th day of June, 1877, those proceedings having proceeded to a decree, (without jurisdiction as we maintain) the present appellant had leave to set them up, and did set them up, in a supplemental answer, and as additional to its defence in the original answer (p. 268). So that the answer in that case contained as defensive matter all the allegations contained in this bill in equity. Attached to this supplement was an exemplification of the proceedings of the U. S. Circuit Court in Michigan, (see p. 271), and it was accordingly demurred to, for that it is apparent upon its face that it states no defence, and that the court in Michigan had no

jurisdiction. This demurrer was sustained (pp. 315, 316, record).

This was the condition of the litigation until November 20, 1877, when this bill was filed. The subpoena was served November 23, 1877. (p. 47.)

The defendants filed their answer to this bill December 3rd, 1877. (p. 49) putting in issue in great detail by way of denial and statement and by the answers by Eliza E. Bangs to interrogatories, all of the allegations of the bill as to facts and events preceding the death of James H. Bangs, the insured.

As to the pretended suit in the district of Michigan they pleaded to the jurisdiction that no subpoena was ever served, or jurisdiction otherwise acquired.

They set up the proceedings at law in case No. 227, averring that in its answer in that case the company pleads in bar all of the facts set up in the bill, viz: the fraud, the suicide, the pendency of the suit in Michigan, and the fact that it had proceeded to final decree: and it is further averred (p. 60) that this suit is fraudulently instituted for securing unjust and unconscionable delays.

The complainant moved for an injunction *pendente lite* which was heard on the 3rd of December, and denied December 13, 1877, (p. 83.)

The law case (No. 227) was then called for trial on the same day, (p. 318.) when the company, by leave of court, granted against the objection of the plaintiff in that case (p. 318) withdrew its original answer, leaving the defense to stand upon the supplemental answer (p. 318) whereupon plaintiff moved for judgment upon that answer, and the demurrer thereto, which had been sustained, and judgment was entered for $11,004.35 damages and costs. To this the company took no exception.

The company forthwith sued out its writ of error in No. 227 and then proceeded to take testimony in the equity case commencing April 30, 1878, (p. 89.) Defendants also took testimony, and, after adducing proof as to the facts and circumstances preceding and attending the death of the insured, introduced (p. 230 *et seq.*) an exemplification of the judgment roll in the case at law.

The cause was heard upon the pleadings and proofs and decree dismissing the bill was rendered at the December, 1878, term (p. 86.)

PROPOSITIONS OF LAW.

I.

The decree is warranted by section 723, p. 137, Statutes:

"Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy can be had at law."

This remedy not only existed in this case, but was, as we have shown, actually chosen by the company and asserted as a defence to the action at law.

Where it appears that this Statute has application, any violation of it is a jurisdictional defect, although the court of first instance may have proceeded to a decree, and notwithstanding technical allegations of fraud and of the necessity for a discovery.

Parker vs. Winnipisseogee Co. 2, *Black* 545.

This court has held that a bill in equity for the delivery up of and cancellation of a life policy was properly dismissed, though evidence of the fraud was considerable, there being no allegation that the holder meant to assign it; and suit on the policy having been began at law after the bill was filed.

Insurance Co. vs. Bailey, 13 *Wall.*, 616.

There is in this bill no allegation of intent to assign. This suit was brought after the suit at law had been instituted upon the policies, (as the bill, art. 33, p. 13 expressly alleges) and after all the facts charged in this bill had been set up by the company as a defence in its answer in that suit at law after the demurrer had been sustained to the averments as to the judicial proceedings in Michigan, and while all the other facts were insisted on therein as defensive.

II.

This bill, as a bill for discovery falls within the prohibition of *Brown vs. Swann*, 10 *Peters*, 497.

The facts could be obtained by the process of the United States Circuit Court for Minnesota in the action at law.

"Every clerk of a court of record, and every justice of the peace may issue subpœnas for witnesses in all civil cases pending before the court."

"All persons except as hereinafter provided, having the power and faculty to perceive, and make known their perceptions to others, may be witnesses; neither parties nor other persons who have an interest in the event of an action are excluded."

R. S. Minn., (*Ed.* 1878,) *Ch.* 73, *Secs.* 1, 7, *page* 792

"Courts of equity will not entertain a bill for a discovery to assist a suit in another court, if the latter is of itself competent to grant the relief; for in such a case, the proper exercise of the jurisdiction should be left to the functionaries of the court where the suit is depending."

Story, Eq. Jur. Sec. 1495.

"It is undeniably a good objection to a bill of discovery that it seeks the discovery from a defendant who is a mere witness and has no interest in the suit; for as he may be examined in the suit, as a witness, there is no ground to make him a party to a bill of discovery, since his answer would not be evidence against any other person in the suit."

Story, Eq. Jur. Sec. 1499.

Now this bill asks no discovery from Edson C. Bangs, the assured. Discovery is required of Eliza E. Bangs only, (p. 14,) and she is a mere witness with no interest whatever in the suit.

III.

Nor does the bill show any grounds for an injunction to stay the proceeding in the action at law.

If a defendant could have availed himself of a defence at law, and failed to do so, equity will not enjoin the execution of the judgment, and a legal defence actually made at law is not ground for a bill, though the court may be of opinion it ought to have prevailed.

Insurance Company, Hodgson 7, *Cranch* 332.

In this case the company actually made the allegations of its bill its defense in the action at law, and was persisting in those defensive averments, before and when, this bill was filed, and so persisted thereafter.

If the defendant at law has a good defense at law, or as perfect and complete as the remedy in equity, the court will not restrain the action.

Kerr on Injunctions, p. 15. citing.
Thrale vs. Ross 3, *Bro., C. C.* 56.
Corporation of Arundel vs. Holmes 4, *Beav* 325.
Norris vs. Day 4 *T. & C.*, 475.
Fox vs. Hill 2 *D. and J.* 356.
Thiedemann vs. Goldschmidt 1 *D. F. and J.* 4.
Hopkinson et al. vs. Lee 1 *Dr.* 2 *Sm.* 168.

See also:
Foster vs. Wood, 6 *Johns, ch.* 87.
Kinney vs. Ogden, 2 *Green, ch.* 168.
York vs. Clopton, 32 *Ga.* 362.
Vilas vs. Jones, 1 *N. Y.*, 274.
Williams vs. Lee, 3 *Atk.* 223.
Menifee vs. Myers, 33 *Tex.* 690.
Yancy vs. Fenwick, 4 *Hen. & Munf.* 423.
Jevne vs. Osgood, 57 *Ill.* 340.
Simmons vs. Martin, 53 *Ga.* 620.
Mastick vs. Thorp, 20 *Cal.* 444.
Tarver vs. McKay, 15 *Ga.* 550.

IV.

The Company, notwithstanding this bill, elected to rely upon its defence in the action at law, and then waived defences which are the identical substance of this bill, and to which the bill contains nothing additional, which it tendered and might have litigated in that action, and suffered the action to proceed to judgment.

As to the suit in equity, so far as the allegations in the bill of fraud and suicide are concerned, the prior action at law wherein the answer contained the same averments, should be held to abate it.

The company filed its bill without any leave requested to withdraw any portion of the answer which it had made at law. Leave to do this was not asked until afterwards. The suit in equity was therefore premature.

As to the averments in the bill of the judicial proceedings in Michigan, *they* became *res adjudicata* against the company by the judgment in the action at law which followed the order sustaining the demurrer. The company elected to defend at law, and did set up and might have tried in that suit, as efficaciously as in equity, all the matters contained in the bill.

The proceedings and judgment in the action at law thereby became an estoppel against the suit in equity, and against all matters which were, or might have been, pleaded in defence to the action at law.

Durand vs. Essex Co. 7 *Wall* 107.

Beloit vs. Morgan, 7 *Wall* 621.

We have shown that this bill was filed after answer in the suit at law by which the same matters were averred.

So the pleadings stood after answer was made in the suit in equity, until the action at law came regularly on for trial. The Company then for the first time requested leave to withdraw all

the allegations of its answer excepting those which set up the judicial proceedings in Michigan, and to rest its defence solely upon them and the demurrer to the pleading by which they were averred. This was election up to a certain point and waiver thereafter as defences withdrawn—defences which the court at law was perfectly competent to adjudicate.

We feel warranted in asserting that it may be fairly inferred from the record that when the action at law, thus permitted by the Company to remain an issue on all the facts, came on for trial, it had no testimony as to the allegations of fraud and suicide so lavishly made in its answer. It therefore withdrew these defences and rested on its exemplification of the proceedings in Michigan. Defeated on the issue to which, by its own act, it narrowed the whole controversy, it persisted in its suit in equity, sought to revive an issue which it had abandoned, and began to take proof about four months after judgment was rendered against it in the action at law.

Such conduct, in a complainant who seeks an injunction, merits an application of the rule laid down by this court: "It should never be permitted to issue where it is even suspected that it will be prostituted to the unworthy purpose of delaying, vexing and harrassing suitors at law in the prosecution of their just demands." *Truly vs. Wanzer*, 5 *How.*, 141.

VI.

The decree is correct upon the facts.

We have attempted to show, and we think we have shown in our brief in record No. 227, that the proceedings in the United States circuit court for the district of Michigan, were without jurisdiction, and we crave leave to refer the court to that brief.

As to the allegations of fraud and suicide, the evidence on behalf of the complainant is conjectural and illusory. Such as it is, it is met and refuted throughout by the answer of Mrs. Bangs to the interrogatories in the bill (page 61, et seq.) by her deposition, and that of Edson C. Bangs (page 225 et seq.) and by the deposition of the physicians, (p. 321, et seq.)

There is no evidence which fairly tends to show that the insured ever had any strychnia in his possession. The evidence (p. 90) of Stewart, the druggist's clerk, is merely that Bangs looked into the dispensatory and while doing so stood near a case in which strychnia was kept with other poisons in a covered box. The witness did not see Bangs take anything and does not testify that any-

thing was missed, and it is evident from his answer (p. 96) that he did not suppose Mr. Bangs took anything from the store. The verdict of the inquest held by the coroner was that the death was natural, and this witness testified on that occasion (p 107) that there was decidedly no possibility of Mr. Bangs getting any of that poison. After the inquest was over the insurance agents appeared and recommended a post mortem examination, *viz*, a dissection. To this Mrs. Bangs objected naturally, and with good reasons, (see her answer to bill 12, 13, 14, 21, 24, p. 63 et seq.)

The company then took advantage of some criminal statute of Michigan respecting cases where persons are supposed to have died by poison, and obtained a warrant from a rural justice of the peace directing the sheriff to disinter the remains. This fraudulent use of criminal process was enjoined by a court of record. (See complaint pp. 8 and 9.) About four months afterwards the suit in equity was begun in the United States Circuit Court for Michigan, and it was a suit of its own kind, begun without right, prosecuted without process or appearance, undertaking to reach the absent, and actually invading the grave, body-snatching the remains of Mr. Bangs, mutilating and transporting them to the Medical College at Ann Arbor, where for aught this record shows they still are. The order for this was made June 30, 1876. (P. 222). The examination of the body, and the chemical analysis of portions of the remains were made by Prof. Douglas, who expressly states (p. 140) that they did not disclose the cause of the death. His testimony then resolves itself into the speculative conjecture that the symptoms preceding Bangs death tend to show that he died from the effects of strychnia. He does not attempt to account for the absence of any trace of poison in the remains, except by a vague theory of diffusion, and says (p. 141) of this poison, that when enough of it has been taken to produce death, "a portion of it would remain in the contents of the stomach, undoubtedly."

Why then, did this accomplished chemist find no strychnia in the remains? Manifestly because it had never been there.

No poison being shown, all the medical testimony for the complainant may be disposed of by the statement that it is assumed that because the symptoms attending the death of Mr. Bangs were claimed to be of a convulsive character, therefore Mr. Bangs died of strychnia, because strychnia causes such convulsions. Even if he did, there is no proof which shows that he administered it to himself, or if he did, whether it was by design or accident. Even if he did, these policies, applied for November 5 and issued Novem-

ber 22, 1875, contain no clause exempting the company from liability in case of suicide. There is no testimony to show when Mr. Bangs first resolved to take his own life, if he ever did so resolve, and of course any such resolution first made after the policies were executed cannot avoid the policies.

What Mrs. Bangs did or failed to do in her alarm and excitement when she came down stairs after hearing her husband fall, or what she did after his death is not competent testimony against the accused. When she saw her husband on the floor she hastened for help, and her conduct throughout, and her account of all the events detailed in her answers to the interrogatiories of the bill, are perfectly consistent with the position that her husband died from the effects of the injuries he received at the mill.

Opposed to this mass of conjectural testimony on behalf of the complainant, is the defendant's proof of the causes that led to the death of his father.

It appears (p 225 *et seq*) that on the 28th day of November, 1875, the insured was attacked violently in a mill by four men while a fifth man held his son, and thrown on the small of his back on a wheat truck or bin. He went home and remained there until he died. He complained thenceforth of pain in his side, head and back. His appearance changed, and his face became pale, pinched up and drawn. He was nervous and would start when spoken to He slept very little, and his respiration became difficult. His heart throbbed so that his wife could hear it beat when she laid her head any where near him. His appetite failed. But two of the men who committed this assault testify for the complainant, and what they say merely palliates the transaction.

Friday night Mr. Bangs was taken sick, (p. 64,) and he died a few days afterwards.

The medical testimony in behalf of the defendant, (p. 321 *et seq*,) shows that the death of the insured was probably caused by injuries to the spine, received in the assault at the mill.

The judgment should be affirmed.

C. K. Davis,
Counsel for Appellees.



